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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [illegible]

SEABOARD SURETY COMPANY,

Petitioner,

vs.

WESTWOOD LAKE, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Miami 32, Florida
Attorney for Petitioner

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TO THE HONORABLE THE CHIEF JUSTICE and
THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on April 18, 1960, rehearing denied May 30, 1960.

CITATION TO OPINIONS BELOW

The opinion and judgment of the District Court is

unreported. The opinion of the Court of Appeals has not yet been reported. The text of the opinion is attached as Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(I) The date of the judgment sought to be reviewed is April 18, 1960.

(II) An order denying a petition for rehearing was entered May 30, 1960. No petition for extension of time to petition for certiorari has been applied for or granted.

(III) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254 (1).

THE QUESTION PRESENTED FOR REVIEW

In an action against three defendants, is an order dismissing the cause as to one defendant, entered on such defendant's motion, but retaining jurisdiction of the other two defendants, appealable prior to final judgment as to the other two defendants, in the absence of the certificate and direction for judgment by the District Court permitted by Rule 54 (b) of the Federal Rules of Civil Procedure?

The Court of Appeals granted a motion to dismiss the appeal as not timely as to the one defendant dismissed on motion in the District Court, although the plaintiff's appeal was timely as to the final judgment as to the other two defendants.

THE STATUTES INVOLVED

The Statute involved is 28 U.S.C. 1291, reading as follows:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court," as amended October 31, 1951, c.655, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(c), 72 Stat. 348.

STATEMENT OF THE CASE

The petitioner, SEABOARD SURETY COMPANY, a New York corporation, sued three corporate defendants in the District Court, Southern District of Florida. Two of the defendants were Florida corporations, the third was an Alabama corporation. Jurisdiction of the District Court was based on diversity of citizenship and the amount involved. No question exists as to the jurisdiction of the District Court.

The Alabama corporation, American Cast Iron Pipe Company, moved to dismiss the complaint as to it for failure to state a claim for relief. The District Court granted this motion "with prejudice". However, the District Court did not make the certificate of "no just cause for delay" and "direction for entry of judgment" as permitted by Rule 54 (b) of the Rules of Civil Procedure.

The case proceeded to trial and final judgment in favor of the two Florida corporations. Plaintiff filed its notice of appeal within thirty days from such final judgment and specified therein that it was appealing not only from the final judgment as to the two Florida corporations but also from the dismissal of the Alabama corporation at an earlier stage of the proceedings.

The appeal was duly perfected in the Court of Appeals by filing and printing the record, and the filing of the appellant's brief. Along with its brief on the merits, the Alabama corporation filed a motion to dismiss the appeal as to it, upon the asserted ground that the order dismissing it as a party was final and appealable when entered, and that the plaintiff's notice of appeal, filed within thirty days after the entry of final judgment but more than thirty days after the order of dismissal was, therefore, too late.

The appellant filed a separate brief in opposition to this motion.

This motion to dismiss the appeal was granted by the Court of Appeals, which, therefore, gave no consideration to the merits of the appeal as to the Alabama corporation.

Reconsideration of this ruling was sought by petition for re-hearing, but it was denied.

In the Court of Appeals the petitioner took the position in its brief and in the petition for re-hearing, that:

"If its claim against the three corporate defend-

ants was a single claim, established law apart from Rule 54 (b) made the dismissal of the Alabama corporation interlocutory and non-appealable prior to final judgment as to the two remaining corporations, and

(2) if the plaintiff's claim was multiple in nature, so as to come within the ambit of Rule 54 (b), then the dismissal of the Alabama corporation was interlocutory and non-appealable, in the absence of the certificate and direction for judgment by the District Court, and

(3) since the result was the same on either hypothesis, it was immaterial whether the plaintiff's claim was single or multiple, and no extended analysis was necessary to make the determination one way or the other, and the Court of Appeals should have overruled the motion to dismiss and considered the merits.

However, for whatever assistance it may be to this court, we include a brief and necessarily incomplete story of what the lawsuit was about.

Westwood Lake, Inc., a Florida corporation, is the developer of a series of residential suburbs near Miami, called Westwood Lake and a series of numbered Additions. To serve these developments, it constructed a central water and sewage disposal plant, to which the various Additions were hooked up as they were prepared for the market. The developer let a contract for the laying of pipe for Additions 2 and 3 to Seaboard Surety's principal, Constructors of Florida, Inc. The work was substantially completed and there was a contract balance of more than $100,000 due on these jobs.

Just before this work was completed, the developer contracted to furnish water to another, unrelated subdivision about a mile away, through a large force main. The contract for this work was let to the same outfit that was doing the work on Additions 2 and 3, but it was unbonded. When this work was completed, there was an unpaid contract balance of about $12,000.

Before the Alabama corporation would deliver pipe to either job, it exacted from the developer a guarantee of payment. It was owed about $20,000 on the job bonded by Seaboard and about $110,000 on the unbonded job. It, therefore, became of interest to the developer to reduce its liability on the guarantee, so it took the entire contract balance due on the bonded job and paid that on the amount due the Alabama corporation on both jobs.

Seaboard was left holding the bag to the tune of about $30,000 for claims it had paid other creditors on the bonded jobs. It sued the developer and its parent corporation, the Mackle Company, and the Alabama corporation, the latter on the theory that it had received money from the bonded job which equitably belonged to Seaboard Surety.

As mentioned above, the District Court granted a motion to dismiss the Alabama corporation as a party and the case proceeded against the developer and its parent. On questions of State law, both the District Court and the Court of Appeals decided that the two remaining defendants were not liable to Seaboard Surety, but the Court of Appeals never got around to deciding whether the Alabama corporation was entitled to be dismissed on the face of the pleadings.

ARGUMENT

The decision of the Court of Appeals to dismiss the appeal under these circumstances falls within at least three of the categories furnishing grounds for certiorari embodied in Rule 19 (b) of this court.

1. It has decided an important question of federal appellate jurisdiction in conflict with many other Courts of Appeal, and in conflict with its own prior decisions.

2. It has decided an important question of federal appellate jurisdiction in conflict with applicable decisions of this Court.

3. It has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Apart from the applicability of Rule 54(b), the rule recognized by all circuits, including the Fifth, is that the dismissal of one defendant in a multiple party action is interlocutory and non-appealable prior to final judgment as to the remaining defendants.

See 6 **Moore's Federal Practice**, page 245. See also the discussion beginning on page 431 of this court's decision in **Sears, Roebuck & Co. v. Mackey**, 351 U.S. 427, particularly footnote 3.

The Fifth Circuit has frequently applied this rule in its own decisions.

See **Meadows v. Greyhound Corp.**, 235 F.(2d) 233;

Dunaway v. Standard Oil Co., 178 F.(2d) 884; **Tauzin v. St. Paul Mercury Indemnity Co.**, 195 F.(2d) 223; **Reagan v. Traders & General Insurance Company**, 255 F.(2d) 845.

Amazingly, the Fifth Circuit, just one week prior to its decision in this case, sua sponte dismissed an appeal from an order dismissing five of six defendants, without the Rule 54(b) certificate and direction.

See **Richards v. Smith**, advance sheets of May 30, 1960, 276 F.(2d) 652.

The conflict of the decision in this case with other Circuits is made to appear by the citation of the following cases, out of a multitude which might be cited:

Felder v. D. Loughran, 188 F.(2d) 623 (C.A.D.C.); **Roberts v. American Newspaper Guild**, 188 F.(2d) 650 (C.A.D.C.); **Tobin Packing Co. v. North American Car Corp.**, 138 F.(2d) 158 (C.A.2); **Garbase v. George A. Giles Co.**, 183 F.(2d) 513 (C.A.1); **Drown v. United States Pharmacopoeial Convention**, 198 F.(2d) 470 (C.A.9); **Shipley Corp. v. Leonard Marcus Co.**, 214 F.(2d) 493 (C.A.3); **District 65 etc. v. McKague**, 216 F.(2d) (C.A.3); **Brondt v. Renfield Importers, Inc.**, 216 F.(2d) 206 (C.A.8).

These cases demonstrate that the decided weight of authority in other circuits supports the position of the petitioner herein, that whether its claim against the three defendants is single or multiple, the dismissal of less than all of the defendants is non-appealable, in the absence of the District Court's certification and direction permitted by Rule 54(b) in those cases of multiple claims to which it is applicable.

The Federal courts are already overburdened with work. The decision in this case will increase that burden unnecessarily, as it will cause endless confusion to litigants, the bar and the Court of Appeals. Is a particular case in the future ruled by this case in the Fifth Circuit, or by the **Dunaway, Meadows, Reagan, Touzin** and **Richards** cases? What finespun distinctions can be resorted to to distinguish them? Can the Court of Appeals be relied upon to follow one or the other rule?

It seems quite certain that careful lawyers must take immediate appeals in all cases where less than all defendants are dismissed. Records must be printed, briefs prepared and printed, and oral arguments had at distant points, all at great expense. And the answer may be that all this was wasted, as in **this** case, the order was not appealable.

On the other hand, the litigant waits until final judgment and then appeals, this too at great expense, only to be told that his case is rule by **Seaboard** and again all this is wasted.

In either event, there is wastage of judicial manpower.

This court can put an end to this by granting certiorari and settiing firmly and forever the correct rule.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18077

SEABOARD SURETY COMPANY,

Appellant,

versus

WESTWOOD LAKE, INC., ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(April 18, 1960.)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

HUTCHESON, Circuit Judge: Including the State Court proceedings against Westwood Lake, Inc, the owner, brought by American Cast Iron Pipe Co., a furnisher of material to the contractor, in which the receiver for the insolvent contractor intervened, there is quite a large record in this case. All, however, that is involved here is the correctness of a judgment entered in a suit brought

by a surety, which had bonded a contractor, against an owner which had employed the contractor to work on the two projects covered by the bonds, one for $214,000.00, the other for $190,000.00, and also on other projects not so covered.

While the claim as made below was for a much larger amount, as pressed here it is: that the contractor had assigned to the surety all payments to become due him; that it had finished the two jobs the surety had bonded; that there were in balances due and unpaid to the contractor by the owner, on account of those jobs, sufficient moneys to pay the surety the $30,000.00 more or less that it had expended in payment of suppliers to the contractor on the two jobs; and that the surety was entitled to recover these sums from the owner out of balances due the contractor on these two jobs, either still in its hands or improperly diverted by it.

In addition to the owner, the suit made parties defendant the Mackle Company, alleged to be a co-contractor with Westwood, and the American Cast Iron Pipe Company, a furnisher of pipe to the contractor, to whom, as a lien claimant, Westwood had made large payments, some before and some after suit by it, on account of moneys due American by the contractor.

On motion, the suit was dismissed as to American, on the ground that no claim for recovery was stated against it, and, after the dismissal of American with leave to amend, Seaboard amended and did not rename American as a party and did not appeal from the order of dismissal. Before the end of the trial, the suit as to Mackle, Inc. was voluntarily dismissed by plaintiff.

Tried to the court without a jury, Westwood's defenses were: that there were no balances due the contractor in its hands; and that it had fully and correctly paid the contractor, or claimants through and under the contractor, who were entitled thereto, all moneys that it owed the contractor.

At the conclusion of the lengthy trial, the district judge filed findings of fact and conclusions of law[1] and

[1] As material here, these are in substance:
"Findings of Fact.
"* * * *
"7. Westwood Lake, Inc. was engaged in the development in South Dade County, of several residential suburbs. In this suit we are concerned only with Westwood Lake Additions 2 and 3.
"8. Westwood had constructed as part of its project a water treatment and sewage disposal plant which was ultimately to furnish water and to supply sewerage facilities for the original subdivision and eleven additions.
"9. As each subsequent addition was developed a contract was let for the installation of water—and sewer-pipes. Constructors of Florida, Inc. (hereafter called the 'Principal'), not a party to this suit, was awarded the contract for such work in addition 2 at a contract price of $214,000.00 and in addition 3 at a contract price of $190,000.00.
"10. On each of these last two mentioned contracts, a payment and performance bond was written by Surety.
"11. Owner subsequently awarded to Constructors another contract to lay pipe from the water-plant to a subdivision known as Miller Heights. Westwood was not the owner of, nor did it have any interest in, Miller Heights other than to supply water to it. No bond was written on this contract.
"12. In each of the applications for the bonds, mentioned in Finding No. 10, there was contained a blanket provision that:
"In further consideration of the execution of said bond the undersigned in the event of any breach, delay or default in said contract, failure of the undersigned to promptly pay, satisfy and discharge any and all obligations which might constitute possible claim under the bond, or breach of the terms of this agreement, hereby assigns, transfers and conveys to the Surety all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the undersigned.

a judgment dated Sept. 1, 1959 based thereon, that the plaintiff take nothing by its suit and that the defendants, The Mackle Co., Inc. and Westwood Lake, Inc., go hence without day.

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or that thereafter may become due and payable to the undersigned on account of said contract . . .

"13. Principal ordered pipe from American Cast Iron Pipe Company, who furnished, to the principal, pipe which was used in Westwood Lake Additions 2 and 3 and also on the Miller Heights job.

"14. In the spring of 1957 the principal got into financial difficulties, and the Surety stepped in and made payments in order to protect its interests. At this time the work on Additions 2 and 3 had been substantially completed.

"15. On April 4, American Cast Iron Pipe Company filed a claim of lien against additions 2 and 3 and against an easement in the right of way of S.W. 48th Street.

"16. On April 11, Surety took so-called supplemental assignments or indemnities from Constructors, by the terms of which there were assigned Constructors' contract balances on Westwood Lake second and third additions as well as on the Miller Heights job, and which purported to cover other indebtedness of Constructors to Surety as well as indebtedness under these particular bonds here involved.

"17. As far as appears from the evidence, the first indebtedness paid by the 'Surety' was by check dated May 7, 1957, apparently for reimbursement of an outside third party who had advanced money to Constructors for running expenses. It is impossible to fix a specific earlier date for the default by Constructors (Principal) in payment. The burden was upon Plaintiff (Surety) to show such a default in order to bring into play the future assignments contained in the bond application. The earliest possible date from which Plaintiff's assignments can be said to date upon the present record is April 11, some seven days subsequent to the filing of its mechanic's lien by American Cast Iron Co.

"18. Plaintiff, 'Surety', admits that there is owing to American Pipe some $19,000.00 to $20,000.00 on its bond on additions 2 and 3 but has refused to pay for the pipe delivered to the Miller Heights job, which had not been bonded.

"19. Plaintiff, 'Surety', subsequent to June 14, 1957, paid out some $31,000.00 to, as far as appears from the record, non-lien-holding creditors of Constructors, taking in return assignments of the claims of these creditors against Constructors and or Westwood Lake, 'Owner.'

Thereafter, on September 24, 1959, plaintiff gave notice of appeal from the judgment in favor of the

"20. Subsequent to the filing of the mechanic's lien, but prior to the suit for foreclosure the lien was transferred to a bond deposited for that purpose; thereafter American filed suit in the State Court to foreclose its lien and joined Constructors (Principal) and Westwood (Owner) as defendants. 'Surety' was not joined in the State Court proceding. Constructors' Bankruptcy Receiver intervened in the lien foreclosure proceeding.

"21. While the foreclosure proceding was pending, attorneys for Westwood (Owner) wrote a letter to Constructors (Principal) announcing its intention to pay $50,000.00 on account to American Cast Iron Pipe. Attorneys for Surety wrote a letter of protest, warning Owner that such a payment would be at the latter's peril.

"22. While the State Court foreclosure proceding was still pending, Plaintiff (Surety) filed this Federal Court action to recover from defendant, Westwood Lake, Inc. (Owner) as assignee of Constructors' rights, the contract balances alleged to be due from the owner to Constructors.

"23. In the State Court foreclosure suit it was adjudicated:

"a. that American Cast Iron Pipe Company and Davis Meter & Supply Co., Inc. had theretofore sold and delivered to Constructors of Florida, Inc., certain cast iron pipe to be used in the construction of .. sewer distribution system for the Westwood Lakes, American having sold and delivered materials to the subject properties in the sum of $129,395.68, and David Meter & Supply Co., Inc. having sold and delivered materials to the subject properties in the sum of $3,228.36.

"b. that on the 4th day of April, 1957, American, and on the 12th day of June, 1957, Davis filed claims to, and duly perfected a lien against, the described property.

"c. • • •

"d. that subsequent to the filing of said claim of lien Westwood Lake • • • Westwood Lake, Inc. made payment to the American Cast Iron Pipe Company, in the sum of $50,000.00, said sum representing monies owed by Westwood Lake, Inc. to Constructors of Florida, Inc., under the contracts between said parties and said sum representing monies owed by Contractors of Florida, Inc. to American Cast Iron Pipe Company for furnishing materials to improve the subject real property. That said payment was made after having given notice to Constructors of Florida, Inc., pursuant to the provisions of F.S.A. 840.05, and Constructors of Florida, Inc., having made no objection to the same, the court found that said payment constituted proper payment under the Florida Mechanic's Lien Law.

defendant, Westwood Lake, Inc. and also from the order entered February 26, 1958, dismissing its complaint with prejudice as to American Cast Iron Pipe Co.,

"e. that subsequent to the filing of the mechanics lien by American, there was paid to American by Constructors of Florida $3460.00 and pipe of a value $22,638.00 comprising a portion of the pipe making up American's total claim and delivered to the Westwood Lakes project; that as a result Constructors is entitled to a credit of $19,632.51, leaving still due and owing from Constructors to American the sum of $56,303.17.

"f. * * *

"g. that Constructors failed and refused to complete the improvement of the subject property pursuant to the contracts between Constructors of Florida, Inc. and Westwood Lakes, Inc., and the latter was required to spend the sum of $5,267.83 for the completion of said jobs. That the total balance due and owing from Westwood Lakes, Inc. to Constructors of Florida, Inc. for work done pursuant to the contracts for the improvement of the Westwood Lakes and the Miller Road extension projects was the sum of $115,801.48. That the total balance due from Westwood Lakes, Inc. to Constructors of Florida, Inc., after the deduction of the proper payment in the sum of $50,000.00 made to Cast Iron Pipe Company, Inc. and the deduction of those sums spent by said Westwood Lake, Inc. for the completion of said job was in the sum of $60,535.65.

"h. that the mechanic's liens filed against the subject property described therein by American Cast Iron Pipe Company and Davis Meter and Supply Co., Inc. complied with the requirements of law in all respects and said liens were good, valid and subsisting against the subject premises to the extent of the amount found due from Westwood Lake, Inc. to Constructors of Florida, Inc., as set forth above, to wit, the sum of $60,533.65.

"i. * * *

"j. * * *

"k. that American Cast Iron Pipe Company have and recover of the above named defendants, jointly and severally, the sum of $56,303.17.

"l. that Davis Meter & Supply Co., Inc. have and recover of Westwood Lake, Inc. and Constructors of Florida, Inc. the sum of $575.60 and in lieu of the payment of said sum that the properties described in the claim of lien filed by the said Davis Meter & Supply Co., Inc. upon appropriate notice, be sold for the satisfaction of said lien.

"m. that all sums of money remaining due and payable

and, American having moved to dismiss the appeal as to it; as untimely, all the matters at issue here were submitted on briefs and oral argument and are ready for disposition.

Disposing first of the motion of appellee, American Cast Iron Pipe Co., to dismiss the appeal, we think it sufficient to say that we are of the clear opinion that, for the reasons stated, and the authorities cited by it in its brief[2] in support of its motion to dismiss, appellant's

by Westwood Lake, Inc., after the payment of the sums provided therein to be paid to American Cast Iron Pipe Company and Davis Meter & Supply Co., Inc., and the costs as taxed in these proceedings, be paid to John Nicholas, as receiver for Constructors of Florida, Inc.

"24. This judgment was not appealed and has in fact been satisfied in full.

"25. There is at the present time no balance due to Constructors of Florida, Inc., remaining in the hands of Westwood Lake, Inc., under the contracts with Constructors of Florida, Inc.

"Conclusions of Law.

"1. The Court has jurisdiction of the parties and to the subject matter under 28 U.S.C.A. 1332.

"2. Plaintiff Surety Company, which sues as assignee of the Principal, Constructors of Florida, Inc., is bound by any defenses valid against Constructors.

"3. Plaintiff Surety Company, as assignee of Constructors, is in privity therewith and having had notice of the State Court action is bound by the disposition made therein of contract balances owing to its assignor.

"4. Since there are no longer any contract balances owing from Defendant, Westwood Lake, Inc., to Constructors, Plaintiff's assignor, Plaintiff cannot prevail in this suit.

"5. Judgment to be entered upon notice in favor of Defendants, Westwood Lake, Inc., and the Mackle Company, Inc., with Plaintiff to pay the costs."

[2] Higgins v. Shenango Pottery Co., et al, 256 F(2) 504, General Time Corp. v. Padua Alarm Systems, Inc. et al, 199 F(2) 351; Siegmund v. General Commodities Corp., Ltd., 175 F(2) 952; MacKay v. Loew's Inc., 182 F(2) 170.

position that the order dismissing its complaint as to American was not final but interlocutory and not appealable until a judgment was entered disposing of the whole case, is completely untenable.

We turn, then, to the real issue in the case, whether, as claimed by the appellant, the effect of the State Court judgment and, therefore of the judgment appealed from, was to divert to a creditor on another job, which was not bonded at all, unpaid contract balances due on the two construction contracts appellant had bonded as surety, and to which, the contractor having defaulted, it was entitled, and a palpable miscarriage of justice has resulted therefrom.

In support of its claim, the appellant Surety argues that the district judge erred in finding that it was bound by the result of the state court suit, in which the contractor, its principal, intervened, and in not concluding that the proof offered in this case did not require a result contrary to that reached in the state court.

The appellee, on its part, urges upon us that whether the result of the state court case was absolutely, or only prima facie, binding on the surety in the federal court, the result reached in the federal court was correct, and the judgment must stand since there was no evidence contrary to the determination of the state court, that it had paid to, or for the account of, the contractor all the balances in its hands due on the two contracts. In addition, it insists that there was no sufficient evidence that, as claimed by plaintiff-appellant, the result was unjust as to the surety for the

reasons stated by it, that in making these payments to, or for the account of, the contractor, Westwood had diverted to other jobs not bonded by it monies due on the jobs Seaboard had bonded and to which it had preference right.

A careful examination of the findings made in the state court and in the district court below convinces us: that the surety has not established its right to the equity it asserts, to have the owner pay again the moneys it has already paid the contractor, this time, however, to the surety who had guaranteed the owner against loss from having to pay twice and who has profited by the payment to American of the amounts admittedly due by the surety to it. We hold, therefore, that, under the evidence as a whole, the district judge was right in his conclusion of law No. 4: "Since there are no longer any contract balances owing from defendant, Westwood Lake, Inc., to Constructors, Plaintiff's assignor, Plaintiff cannot prevail in this suit."

In **Town of River Junction v. Maryland Casualty Co.**, reported in 110 F(2) 278 and 133 F(2) 57, this court dealt with a situation somewhat similar to that prevailing here. There a contractor, with a clause in its bond similar to that in the bond here, which had assigned to the surety under certain conditions retained payments, borrowed money from a bank and the bank used the money in part to pay creditors of the contractor. The surety sued the Town and the Bank for a balance claimed to be due it as assignee of the contractor. The district court gave the surety a judgment and Town and Bank appealed. This court, one judge dissenting, re-

versed the judgment and remanded the cause for trial anew. On the new trial the Town and the Bank sought to show that the money had been expended for claims which the Surety was bound to pay and for which, if they had not been paid by the bank, the surety would be liable. The district judge, deciding this issue against Town and Bank, gave judgment for the surety, they appealed, and this court, holding that the decision was in part clearly erroneous, said:

> "* * * The surety was bound to see that all labor and material claims were paid, and to carry the job to completion. The claims of laborers and materialmen were a charge or incumbrance on the money due the contractor by the town, and against the surety's own bond . . . The surety has gotten its obligations discharged by the money furnished by the bank, with the cooperation of the town. The surety has no moral or equitable right to have the bank pay back or the town to pay again. The surety has chosen an equitable forum. In the original complaint, he asserts his claim against the bank for $5,105.77, paid it by the town thus: 'that in equity and good conscience the said Gadsen County State Bank now holds said sum of money in trust for the benefit of your orator.' We think equity and good conscience entirely the other way. **Whether or not the bank could actively enforce a subrogation against the surety of the claims its money paid, it can at least prevent a recovery in equity by the surety.**" (emphasis supplied)

Here the surety admits that it owed, but did not pay, American $20,000.00, and that the payment to American by Westwood discharged that obligation. The situation standing thus with Westwood, the owner, having under a judgment in the state court, entered after a full trial, paid out all the monies that it owed the contractor, it would be unjust for the surety to recover against it without a clear and strong showing that the payments made by Westwood to the contractor were induced by fraud or other overreaching, or were palpably wrong.

There could be no argument about this if the judgment, which directed Westwood to pay out the balances due it to the contractor, was absolutely binding on the surety, and appellee insists that, on this record with the judgment being prima facie binding on the surety, appellant would stand no better here because it did not in his suit offer any evidence which established, with the clarity and certainty required, that there was fraud or wrongdoing in connection with the State Court trial or the payments ordered and made in that suit, or that the result thereof was in any respect contrary to right and equity.

This court has had occasion to write several times on the question of the effect of judgments in suits upon sureties who, though not parties to, had knowledge of, them.

In a suit arising in Florida, **Lake County v. Mass. Bonding & Insurance Co.**, 75 F(2) 6, this court went fully into the effect of a judgment against the contractor on a construction bond in a suit, to which the surety was not

a party. There it was argued that the judgment which was obtained against the principal was "in the absence of a showing of collusion or fraud in its obtaining, conclusive against the surety". It was also argued that if the judgment was not conclusive, it was at least prima facie evidence requiring a verdict for him unless rebutted by clear proof, and that it, together with the positive testimony of the plaintiff Baxley and the other supporting evidence, clearly made an issue for the jury. In support of his claim that the judgment was at least prima facie evidence, many cases were cited. This court, reversing the case, on the plaintiff's appeal, for errors in the trial, stated at page 8:

> "In view of another trial, we think it proper to say, upon the point appellant makes as to the effect of this judgment against Hardee, that while the authorities are apparently in dispute, we think the true statement of the law is this: Where it appears that the judgment against the defendant was obtained in a suit of which the surety had full knowledge, and which it had full opportunity to defend, the judgment therein is not only evidence, but conclusive evidence, against every defense except that of fraud and collusion in obtaining it." (authorities) "Where it is not made to appear that the surety knew of and had opportunity to defend the suit, then the judgment is prima facie evidence that the surety is liable, sufficient to support a verdict unless it is rebutted by proof on the part of the surety that it was obtained through fraud or collusion, or that the loss or liability created by

> the judgment arose from acts other than those indemnified against under the conditions of the bond."

Tried again, it came back on the appeal of the same plaintiff, under the style of **Lake County v. Mass. Bonding and Insurance Co.**, 84 F(2) 115. The court below, in submitting the issue to the jury, charged that the prior judgment was not absolutely binding on the defendant but it would prima facie fix the amount of the indebtedness, and appellant complained that he should have charged that the introduction of the judgment cast upon defendant the burden of overthrowing it. We disagreed with this, saying:

> "The burden was upon plaintiff throughout to establish his right to recover. (authorities)" "The judgment against Hardee did not operate as an estoppel against defendant. It was evidence, sufficient indeed for recovery if no evidence was introduced by defendant. When, however, defendant offered evidence, the judgment was like all the other evidence to be considered by the jury upon the question whether plaintiff had made out his case."

In a later case, **United States v. Maryland Casualty Co.**, 204 F(2) 912, this court, stating that the effect of the prior judgment was a matter of substance, and the law of the state controlled, held that, since in Alabama a judgment against the principal is not binding on the surety at all except under certain conditions, those con-

ditions not appearing, the judgment was not binding at all.

Here appellant in effect concedes, and, if not, the authorities compel the conclusion, that the judgment

50 Am. Jur.; pp. 1036-1039, "Suretyship", Secs. 200-201; 72 C.J.S. pp. 706-708, "Principal and Surety", Sec. 261; Merriman v. Lewis (Florida), 194 So. at p. 352.

it at least prima facie binding on the surety.

We are of the clear opinion that; if treated as no more than this, considering, the record as a whole, the attitudes of the parties, and particularly that, if Westwood, the owner, is wrongfully cast in judgment, it will be made to pay the same sums twice, there must be a very clear showing, that the state court proceeding against the contractor wrought an injustice on the surety; and that this record cannot be read as making any such showing. It is entirely true, indeed there is specific evidence, that, in running these various jobs, the accounting system was confused and inaccurate, and, generally speaking, all the jobs were in effect treated as one, payments being made from and in respect to each of them indiscriminately. In addition, there is specific and positive evidence that, while, in the state court, the receiver for the contractor for a time undertook to claim that American Cast Iron was seeking payment out of monies due on one job for pipe furnished to another, it was established that payments had been made indiscriminately, all the jobs being treated as one, and that, while the evidence showed that at a certain time there was a great deal more money left in one of the jobs

than in another, this was due to the fact that the funds had been restored to indiscriminately and no precise allocation made. The fact, then, of which the appellant tries to make so much, that at one time there was $103,000.00 still due on the jobs that it had bonded, and only about $15,000.00 due on the Miler Heights job, and that of the large sums due to American, a great part of them arose out of the Miller Heights job, is, under the court's findings, of no significance because there is other evidence in the record showing, or tending to show, that this result had been brought about by drawing from the Miller Heights job to pay monies due on the other jobs. In short, the records are in such a jumbled and confused state that it cannot be said that the district court erred in holding that the surety had failed to make good its claim, that monies due on the jobs it had bonded had been, to the surety's prejudice, diverted from those jobs to others.

The judgment appealed from is AFFIRMED.

APPENDIX B

JUDGMENT

Extract from the Minutes of April 18, 1960.

SEABOARD SURETY COMPANY,

No. 18077. versus

WESTWOOD LAKE, INC., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Seaboard Surety Company, and the surety on the cost bond herein, American Surety Company of New York; be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of May 30, 1960.

SEABOARD SURETY COMPANY,

No. 18077. versus

WESTWOOD LAKE, INC., ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 188

SEABOARD SURETY COMPANY,

Petitioner,

vs.

WESTWOOD LAKE, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN CAST IRON PIPE COMPANY

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213 Security Trust Building
Miami 32, Florida
Attorney for Respondent
American Cast Iron Pipe Company

IN THE

Supreme Court of the United States

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SEABOARD SURETY COMPANY,
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vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN CAST IRON PIPE COMPANY

THE QUESTIONS PRESENTED FOR REVIEW

The Respondent respectfully submits that the single question as set forth in the Petitioner's Petition for Writ of Certiorari does not accurately present to this Court the issues involved. The Respondent, therefore, restates the questions presented for review as follows:

I

Is an order dismissing a complaint with prejudice as to one defendant because of the plaintiff's failure to

amend the complaint as to said defendant within the time permitted by the Court a final and appealable judgment upon which an appeal must be prosecuted within the time provided by the Rules and not within the scope of Federal Rule of Civil Procedure 54 (b) where the complaint contains a single claim for the identical sum from each defendant and charges the defendants with **several** and not **joint** liability?

II

Where a plaintiff elects (a) not to reduce to final judgment and take an appeal from an order dismissing its complaint as to one defendant with leave to amend, and (b) elects to abandon its claim as to said defendant by failure to amend as to said defendant within the time permitted by the Court, and (c) elects to voluntarily file its amended complaint as to the other defendants, does such plaintiff waive any alleged claim as to said dismissed defendant precluding it from raising any issue concerning the alleged validity of its original complaint on appeal?

STATEMENT OF THE CASE

The statement of the case as contained in the Petitioner's Petition for Writ of Certiorari contains much material which is not properly before this Court in this proceeding.

The merits of the Petitioner's claim against the Respondents, WESTWOOD LAKE, INC. and the MACKLE CO., INC., is not before this Court for review. After a lengthy trial the District Court entered a judg-

ment adverse to the Petitioner and the same was affirmed by the Court of Appeals.

The merits of the Petitioner's original complaint as the same sought to charge the Respondent, AMERICAN CAST IRON PIPE COMPANY, is not before this Court for review, except to observe that it contained no allegation of facts which would impose any joint liability upon this Respondent and the other Respondents.

The following sequence of events should be set forth for the Court:

On February 4, 1956, the District Court entered its Order denying Motions to Dismiss filed by WESTWOOD LAKE, INC. and the MACKLE CO., INC. and requiring said parties to file an Answer within thirty days, and granting the Motion to Dismiss of AMERICAN CAST IRON PIPE COMPANY with leave to file an Amended Complaint as to this party within ten days. (R. 5-6)

On February 26, 1958, the Petitioner having elected not to file an Amended Complaint as to AMERICAN CAST IRON PIPE COMPANY, the Court entered its Order dismissing the complaint as to AMERICAN CAST IRON PIPE COMPANY with prejudice upon the grounds that there was a failure to plead within the time set in the Court's Order of February 4, 1958. (R. 10-11)

AMERICAN CAST IRON PIPL COMPANY did not obtain from the Court any express determination and direction described in Rule 54 (b) because the complaint did not contain multiple claims but in contrast thereto contained a single claim for the identical sum of money

against different defendants in their alleged **several** and not **joint** liabilities.

On February 27, 1958, the Petitioner filed its Amended Complaint against WESTWOOD LAKE, INC. and the MACKLE CO., INC. only, having voluntarily abandoned its claim as the same allegedly existed against AMERICAN CAST IRON PIPE COMPANY by its election not to appeal from the Court's Order of February 4, 1958, and by its election not to amend as to this defendant by the time permitted by the Court. (R. 6-10)

On September 1, 1959, the District Court entered a judgment adverse to the Petitioner and in favor of WESTWOOD LAKE, INC. and the MACKLE CO., INC. (R. 333-334)

On September 24, 1959, the Petitioner gave Notice of Appeal from the judgment of September 1, 1959, and from the Order of February 26, 1958. (R. 337-338)

On April 18, 1960, the Circuit Court of Appeals, Fifth Circuit, dismissed the appeal from the Order of February 26, 1958. (Petitioner's App. 7-8)

ARGUMENT

No grounds are stated in the Petition for Certiorari for the granting by the Court of this discretionary writ.

The Petitioner cites no conflicting decisions of other Courts of Appeals and cites no conflicting prior decisions of the Court of Appeals, Fifth Circuit.

The Petitioner cites no conflicting decisions of this Court.

The Petitioner has wholly failed to demonstrate that the Court of Appeals has departed from the accepted and usual course of judicial proceedings such as to call for this Court's power of supervision.

The Petitioner has failed to cite the decisions of other Courts of Appeals which are not only not in conflict with this decision of the Court of Appeals, Fifth Circuit, but are in direct conformity with the same.

The decision of this Court and the decision of the Court of Appeals cited by the Petitioner hold that in cases involving **multiple claims** a decision as to less than all of the claims is not final and appealable without compliance with Rule 54 (b). **Sears, Roebuck & Co. v. MacKey**, 351 U. S. 427, 100 L. ed. 1297, 76 S. Ct. 895 (1956); **Shipley v. Leonard Marcus Co.**, 214 F. (2d) 493 (1954 C.A. 3).

The decisions of all the Courts of Appeals including the Fifth Circuit hold that the dismissal of one defendant in a multiple party action is interlocutory and non-appealable prior to final judgment as to the remaining defendants where the liability of all defendants is **joint** rather than **several**. **Meadows v. Greyhound Corp.** 235 F. (2d) 233 (1956 C.A. 5); **Dunaway v. Standard Oil Co.**, 178 F. (2d) 884 (1949 C.A. 5); **Tauzin v. St. Paul Mercury Indemnity Co.**, 195 F. (2d) 223 (1952 C.A. 5); **Reagan v. Traders & General Insurance Company**, 255 F. (2d) 815 (1958 C.A. 5); **Ricard v. Smith**, 276 F. (2d) 652 (1960 C.A. 5); **Garbose v. George A. Giles Co.**, 183 F. (2d) 513

(1950 C.A. 1); **District 65 etc. v. McKague,** 216 F. (2d) 153 (1954 C.A. 3); **Brondt v. Renfield Importers, Inc.,** 216 F. (2d) 206 (1954 C.A. 8).

The Petitioner contends that the above cited cases of the Court of Appeals, Fifth Circuit, and of the Courts of Appeals of other circuits are in conflict with the decision of the Court of Appeals in this cause.

The Petioner also cites the cases of **Feiler v. D. Loughran,** 188 F. (2d) 623 (1951 C.A.D.C.); **Roberts v. American Newspaper Guild,** 188 F. (2d) 650 (1951 C.A.D.C.); **Tobin Packing Co. v. North American Car Corp.** 188 F. (2d) 158 (1951 C.A. 2); **Drown v. United States Pharmacopoeial Convention,** 198 F. (2d) 470 (1952 C.A. 9). These cited cases involve multiple parties and in each case an appeal from a decision with regard to less than all of the parties was dismissed where there was no compliance with Rule 54 (b). The opinions contain no discussion concerning the precise grounds for the decisions and contain no discussion as to whether the cases involve multiple claims or whether the liability of the defendants was joint or several. Therefore, it cannot be said that the decision of the Court of Appeals, Fifth Circuit, is in conflict with any of these cited cases.

Federal Rule of Civil Procedure 54 (b) has no application whatever to a suit which involves only **multiple parties** and not **multiple claims.** The Rule is only applicable where there are **multiple claims.** The dismissal of less than all defendants where there are multiple defendants **jointly** liable is not a final judgment and appealable although Rule 54 (b) is not applicable to these cases. The dismissal of less than all defendants in a multiple

party action where the defendants are liable **severally** and not **jointly** is a final and appealable judgment although Rule 54 (b) is not applicable to these cases. The instant case falls within this last group.

There is ample authority to support the decision of the Court of Appeals, Fifth Circuit, and these authorities are not in conflict with the decisions of any Court of Appeals or with any decision of this Court.

A case which is analogous to the instant case is the case of **Higgins v. Shenango Pottery Company et al.**, 256 F. (2d) 504 (1958 C.A. 3). This case was a stockholder's derivative action against a corporation, certain officers thereof, and other individual defendants, to recover damages for alleged diversion of corporate business to a partnership consisting of the officers and the other individual defendants. A Judgment of Dismissal was entered as to those individual defendants who were not officers of the corporation and the plaintiff appealed from this order. The Court of Appeals, Third Circuit, held that this order was final and appealable and that Rule 54 (b) of the Federal Rules of Civil Procedure was not relevant. The plaintiff was suing upon one single claim as to which the defendants were **severally** and not **jointly** liable. In the Opinion, the Court stated:

> "(5) Rule 54 (b) of the Federal Rules of Civil Procedure, 28 U.S.C. is not relevant to this appeal. By its terms its application is to 'multiple claims.' As pointed out in Sears, Roebuck & Co. v. Mackey, 1956, 351 U.S. 427, 76 S. Ct. 895, 899, 100 L. Ed. 1297: 'The amended rule does not apply to a single claim'."

"* * * (T)here is no doctrine that finalty is lacking in an order simply and solely because it dismisses less than all the parties. Where 'jointness', in some form, is absent, the test in multiple party cases is whether the order terminates the suit 'as a severable matter' or a 'distinct matter,' with respect to the party dismissed."

The following cases stand for the same proposition as to which there is no conflicting authority: **General Time Corp. v. Padua Alarm Systems, Inc. et al.**, 199 F. (2d) 351 (1952 C.A. 2); **Siegmund v. General Commodities Corporation, Limited.**, 175 F. (2d) 952 (1949 C.A. 9).

The Petitioner ignores the second question presented for review; namely, the Petitioner's abandonment and waiver of its alleged claim against the AMERICAN CAST IRON PIPE COMPANY.

Where a plaintiff files an **amended complaint**, the sufficiency of the **original complaint** is not subject to review upon appeal where the entire proceedings have been predicated upon the allegations of the **amended complaint**, the sufficiency of the **original complaint** having become moot.

In the case of **MacKay v. Loew's Inc.**, 182 F. (2d) 170, (1950 C.A. 9) cert.den. 340 U.S. 828, 95 L. Ed. 608, 71 S. Ct. 65, reh. den. 340 U.S. 885, 95 L. Ed. 643, 71 S. Ct. 194, the Court refused to review original complaints where amended complaints had been filed. The Court of Appeals, Fifth Circuit, relied upon and cited this case in rendering its decision which the Petitioner seeks to have this Court review. (Petitioner's App. A 7)

The Petitioner did elect to file an amended complaint and a second amended complaint and elected not to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant therein. The amended complaint and the second amended complaint contain allegations as to which there is no indication or suggestion in the original complaint.

The Petitioner could have exercised its election to omit the AMERICAN CAST IRON PIPE COMPANY as a party defendant and proceed upon its amended pleadings against the other defendants in two ways: (1) By filing an amended complaint **within** the time amendment was permitted as to the AMERICAN CAST IRON PIPE COMPANY, and voluntarily failing to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant in the amended complaint, or (2) by voluntarily delaying the filing of its amended complaint **beyond** the time amendment was permitted as to the AMERICAN CAST IRON PIPE COMPANY and thus voluntarily failing to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant in the amended complaint. The second alternative was as free and voluntary as the first.

The Petitioner could have filed a timely appeal from the Order of the District Court dismissing its complaint as to AMERICAN CAST IRON PIPE COMPANY and the matter could have been adjudicated. The Petitioner by failing to take a timely appeal now seeks to obtain a second opportunity to try its case having failed to prevail against the Respondents, WESTWOOD LAKE, INC. and the MACKLE CO., INC.

The cases of **Higgins v. Shenango Pottery Company et al.**, supra, **General Time Corp. v. Padua Alarms Sys-**

tems, Inc. et al., supra, **Siegmund v. General Commodities Corporation, Limited,** supra, are not in conflict with any decision of any Court of Appeals or of this Court. The Court of Appeals, Fifth Circuit, relied upon and cited these three cases in rendering its decision which the Petitioner seeks to have this Court review. (Petitioner's App. A 7)

The terms "claims" and "parties" are legal words of art well understood by lawyers and judges. **Meadows v. The Greyhound Corporation,** supra. Attorneys, such as those for the Respondent, AMERICAN CAST IRON PIPE COMPANY, should be permitted to rely upon the distinction and should not be required to obtain a determination and direction pursuant to Rule 54 (b) where the Rule is not applicable.

Where there are no conflicting decisions, this Court should not exercise its discretion in granting the discretionary Writ of Certiorari in order to change Rule 54 (b) by judicial interpretation.

It is respectfully submitted that no grounds for the granting of the Writ of Certiorari are set forth in the Petition and that the Writ of Certiorari should be denied.

SAMUEL J. KANNER
213 Security Trust Building
Miami 32, Florida

Attorney for Respondent
American Cast Iron Pipe Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of the Respondent AMERICAN CAST IRON PIPE COMPANY was mailed to JAMES A. DIXON, Attorney for the Petitioner, Dade Federal Building, Miami 32, Florida, and WILLIAMS & SALOMON, Attorneys for the Respondents WESTWOOD LAKE, INC. and the MACKLE CO., INC., 1003 duPont Building, Miami, Florida, this 26th day of July, 1960.

SAMUEL J. KANNER
213 Security Trust Building
Miami 32, Florida

IN THE

Supreme Court of the United States

October Term, 1959

No. 188

SEABOARD SURETY COMPANY,

Petitioner,

vs.

WESTWOOD LAKE, INC., et al.,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit.

REPLY BRIEF OF PETITIONER

JAMES A. DIXON
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Miami 32, Florida
Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1959

No. 188

SEABOARD SURETY COMPANY,

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Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit.

REPLY BRIEF OF PETITIONER

The Respondent, AMERICAN CAST IRON PIPE COMPANY, apparently misconceives the scope of the Petitioner's argument, in its Petition for Certiorari, and the nature of the case stated in the original complaint.

In the original complaint (R. 4) the plaintiff alleged, in paragraph 8, both a joint and a several liability against three defendants, of which AMERICAN CAST IRON PIPE COMPANY was one. The prayer (R. 5) was for a joint and/or several judgment against all three defendants.

The Respondent's brief argues on the assumption that the complaint states a single claim against three defendants severally. The only meaning we can attach to this is that the complaint claims against the defendants only in the alternative. The terms of the complaint show that this simply is not so.

However, the scope of the Petitioner's argument that this court should grant certiorari in this case goes beyond this very narrow question as to what the complaint alleges as to the joint and several liability of the three defendants.

Prior to the adoption of amended Rule 54 (b), there was much discussion in the cases as to when a case involved "jointness" as between defendants and when it involved "distinctness". If it involved "jointness", an order dismissing one of two or more defendants was interlocutory and non-appealable. If it involved "distinctness" between defendants, the order was final and appealable.

The books are full of fine-spun distinctions between the two, a veritable morass of confusing semantics, and as mentioned in our original brief in support of the Petition for Certiorari, much unnecessary judicial manpower was wasted, to say nothing of the labors of the bar and the expense to the litigants. The same will continue to be true, if the decision in this case is allowed to stand.

The amendment to Rule 54 (b) made many judgments interlocutory and non-appealable, which formerly would have been final, when the District Court fails to make the "determination" permitted by the amendment.

6 Moore, pages 218-220

Among the instances cited by the author (footnote 25) is the dismissal of less than all defendants.

At page 245 of the same volume the author says:

"The operational effect of the negative approach of the Rule obviates the necessity to distinguish between "jointness" and "distinctness", and to that extent the former troublesome problem is obviated. To illustrate. Suppose a plaintiff sues two or more defendants; and the district court dismisses the action as to one of the defendants but does not execute its certificate. This adjudication lacks finality. The reasons: (1) if the defendants' liability be regarded as "joint" so that the action contains only one claim so that amended 54 (b) is inapplicable, prior law, nevertheless, holds that the adjudication lacks finality; (2) if the defendant's liability be regarded as "distinct" or "separate" so that the action contains multiple claims, then, since the district court did not execute a certificate, amended 54 (b) makes the adjudication interlocutory, and it is immaterial that the adjudication would formerly have been final.

"Hence in a host of cases, which involved multiple parties, an order terminating the action as to one or more but less than all of the parties, has been held to lack finality where the district court had not executed its certificate."

(Footnotes omitted)

A similar rationale is expressed by Judge Frank, in **Republic of China v. American Express Co.**, 190 F. 2d 334, at page 338.

> "We interpret the Rule (amended 54 (b)) as meaning no more than this: Before the Rule, an order of the kind described therein, even if it would otherwise have been final, was nevertheless interlocutory when the trial judge stated that he was reserving the power to alter it, for then it was but a provisional or tentative order. As, by his explicit reservation, he left the order revocable, he kept it in suspense, and therefore truly interlocutory, hence not appealable. The only effect of Rule 54 (b) is that it requires us to treat the trial judge's silence concerning an order covered by that Rule as the equivalent of such an explicit reservation; in failing to utter a "determination," he is deemed to have made his order subject to his own recall at any time before the end of the entire litigation; . . ."

See also the discussion by Mr. Justice Burton in **Sears, Roebuck & Co. v. Mackey**, 351 U. S. 427, beginning at the bottom of page 433, and continuing to the top of page 436.

In the present case, there is one claim against Westwood Lake, Inc. for wrongfully refusing to pay money claimed to be due the plaintiff. There is another claim against American Cast Iron Pipe Company for what is in effect unjust enrichment at the expense of the plaintiff. That the plaintiff can have but one satisfaction is immaterial. It is likewise immaterial that Westwood Lake, Inc. has been held not liable to the plaintiff be-

cause it paid out money without objection from plaintiff's principal, because even then American Cast Iron Pipe Company may still have been unjustly enriched.

What we most strongly urge upon the Court, however, is that this court state clearly the converse of the rule of the **Mackey** case, that is, that where less than all defendants are dismissed, in a case like this, the order of dismissal is not final and appealable unless the District Court makes its "determination." We believe that the District Courts can be trusted to "dispatch" (to use Mr. Justice Burton's phrase) all proper cases to the appellate courts.

The second point made in respondent's brief is without merit. The plaintiff, and petitioner here, never waived or abondoned its original complaint against American Cast Iron Pipe Company. Instead, it refused to amend, stood on the original complaint and suffered final judgment against it for so doing. The subsequent amendments related solely to the other two defendants.

The only question here involved is **when** that judgment in favor of American Cast Iron Pipe Company became appealable. If this court will settle that question, it will save much judicial manpower, much labor by the bar and much expense to litigants.

Respectfully submitted,

JAMES A. DIXON
9th Floor, Dade Federal Building,
Miami 32, Florida.
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed to SAMUEL J. KANNER, 213 Security Trust Building, Miami 32, Florida, attorney for the Respondent, American Cast Iron Pipe Company, and to WILLIAMS & SALOMON, 1003 DuPont Building, Miami, Florida, attorneys for the Respondents, Westwood Lake, Inc. and Mackle Co., Inc., this [illegible] day of August, 1960.

JAMES A. DIXON
9th Floor, Dade Federal Building,
Miami, Florida.